

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E405149

VIRGIL C. FURR (Dec'd), EMPLOYEE	CLAIMANT
BECHTEL POWER CORPORATION, EMPLOYER	RESPONDENT NO. 1
FREMONT INDUSTRIAL INDEMNITY, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JUNE 18, 2010

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by the HONORABLE LAURA J. MCKINNON,  
Attorney at Law, Russellville, Arkansas.

Respondents NO. 1 represented by the HONORABLE MICHAEL L.  
WRIGHT, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY KING,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed in part,  
affirmed in part.

OPINION AND ORDER

The claimant and the respondents appeal an  
administrative law judge's opinion filed September 8, 2009.  
The administrative law judge found that the claimant did not  
prove the respondents were liable for any additional medical  
expenses. The administrative law judge found that the  
claimant's attorney was entitled to additional fees for  
legal services, but that a penalty should not attach for

late payment of attorney's fees. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion in part and affirms in part. The Full Commission finds that the claimant proved he was entitled to additional medical treatment. We find that the claimant's attorney was entitled to fees for legal services, but that a penalty should not attach for late payment of attorney's fees.

I. HISTORY

The parties stipulated that the claimant, Virgil Columbus Furr, sustained a compensable injury on September 13, 1993. Dr. Andrew M. Monfee began treating the claimant on September 14, 1993 and assessed acute lumbar strain. Dr. Edward H. Saer, III treated the claimant beginning in October 1993. Dr. Saer performed a lumbar fusion on the claimant on September 25, 1995. An administrative law judge filed an opinion on October 29, 1996. The administrative law judge found, among other things, that "Medical expenses and temporary total disability benefits from April 19, 1994 to March 1, 1996, have been paid." The administrative law judge found that surgery provided by Dr. Saer was reasonably necessary, and the administrative law judge directed the

respondents to "pay all medical expenses associated with Dr. Saer's treatment within 30 days of receipt pursuant to Rule 30." The administrative law judge found that the claimant was entitled to continued temporary total disability benefits. The administrative law judge found that the claimant's attorney was entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715.

The Full Commission affirmed and adopted the administrative law judge's October 29, 1996 decision in an opinion filed August 27, 1997. The Arkansas Court of Appeals affirmed the Commission in an unpublished opinion. *Bechtel Power Corp. v. Furr*, CA97-1419 (May 20, 1998).

The claimant began treating with Dr. Marc A. Valley, a pain management specialist, on December 11, 1997. Dr. Saer opined on March 12, 1999 that the claimant had reached maximum medical improvement from his surgery and had sustained a 15% anatomical impairment rating. The parties have stipulated that Respondent No. 1 paid indemnity benefits at the "total disability rate" until March 18, 1999. Edna Furr, the claimant's wife, testified, "In March 1999, they just quit paying. I mean, they didn't send a

notice or anything. They just quit paying....March 19<sup>th</sup> of '99."

A pre-hearing order was filed on August 22, 2001. The claimant contended that benefits previously awarded to him remained unpaid and that he was permanently and totally disabled. Respondent No. 1 contended that it had paid all appropriate benefits and that the claimant was not entitled to any permanent disability compensation exceeding the extent of permanent physical impairment established by the medical records. A billing coordinator for Dr. Saer informed counsel for Respondent No. 1 on October 18, 2001, "[Virgil Furr] has no outstanding balance with Arkansas Spine Center."

An administrative law judge filed an opinion on March 11, 2002. The administrative law judge found that the claimant proved he was permanently and totally disabled. The administrative law judge found that the claimant "failed to prove by a preponderance of the evidence that any benefits previously awarded remain unpaid." Both parties appealed to the Full Commission.

Edna Furr testified, "They did not pay any checks again until April 1<sup>st</sup> of 2002. And then that's when they started

resuming their payments and they resumed them until he died." Delores Perkins, a claims adjuster, testified that AIG became the carrier in the case in April 2002. Ms. Perkins testified that she did not know what payments were made or how the claim was administered prior to April 2002.

The Full Commission filed an order on January 28, 2003 and affirmed the administrative law judge's March 11, 2002 finding that the claimant proved he was permanently and totally disabled. The Full Commission remanded the case to the administrative law judge and directed the parties to develop a record sufficient to show which of the claimant's medical expenses, indemnity benefits, and attorney's fees remained unpaid or were paid late. The Full Commission instructed the administrative law judge to enter findings with regard to issues including the extent of the claimant's healing period and fees for legal services.

Neither the parties nor the administrative law judge then-presiding over the case took any action consistent with the remand from the Full Commission.

Dr. Dennis D. Lucy corresponded with the administrative law judge and the parties on September 16, 2004:

I saw this 60 years old gentleman on  
09/09/04....Mr. Furr's chief complaints

in the order that he gave them to me were:

1. numbness of his legs
2. pain in his legs
3. tingling in his toes bilaterally
4. itching sensation in his legs
5. pain associated with standing up ...

Mr. and Ms. Furr relate the onset of all of these complaints to an injury which he sustained at work in 1993....

The acute trauma which Mr. Furr sustained in September 1993 played a minor, if any, role in the development of his spondylosis....in my opinion to a reasonable degree of medical certainty, Mr. Furr's present incapacitation is not causally related to the trauma which he sustained on 09/13/93.

In my opinion, Mr. Furr is a candidate for re-evaluation and consideration of additional treatment. There has been continued advancement in the treatment for this condition since his surgery in 1995. A CT study may be able to demonstrate whether or not the fusion has held. If it has not held together, another procedure may help him obtain pain relief. The first steps would be to see if Mr. Furr and a back surgeon would consider another operation. Also, Mr. Furr's psychological evaluation indicated that depression was a factor affecting his pain and as far as I have determined, he has not seen a psychiatrist. I believe he should have additional psychiatric evaluation and possibly psychiatric treatment before he has another operation.

The claimant was seen at Monfee Medical Clinic on January 10, 2005. The assessment/plan was "Chronic pain management - will assume care for Dr. Valley." The claimant was prescribed refills of medication. Dr. Valley informed

the claimant's attorney on February 21, 2005, "I have relocated my practice to Lexington, Kentucky and have closed my Russellville, Arkansas Clinic. Therefore, I have referred the above referenced patient to Dr. Andrew Monfee, MD for continuation of care."

The parties stipulated that Respondent No. 1 paid indemnity benefits at the total disability rate until the Death & Permanent Total Disability Trust Fund began paying permanent total disability benefits on September 26, 2005. Delores Perkins testified that the respondent-carrier controverted additional medical treatment in March 2006. The parties stipulated that the claimant died on December 4, 2007. Delores Perkins testified on November 12, 2008 that she did not know of any bills currently pending to be processed for payment.

Counsel for Respondent No. 1 corresponded with the claimant's attorney on December 8, 2008 and stated in part, "the respondents controverted any medical treatment after the date of March 2006. The respondent had actually filed the form to controvert additional medical treatment in August of 2005, however, there was a misunderstanding with the carrier and they continued to pay medical bills until

March of 2006. At that time, the respondents ceased paying medical expenses contending Mr. Furr was no longer receiving reasonable and necessary medical treatment for his injury. The basis for our position was an IME report by Dr. Richard Lucy, neurosurgeon."

A pre-hearing order was filed on May 28, 2009. The claimant contended, among other things, entitlement to reasonably necessary medical treatment; total disability benefits; statutory penalties, interest, and additional fees; and controverted attorney's fees. The respondents contended that they had paid all benefits awarded, that all attorney's fees that were owed on controverted benefits had been paid, and that no further benefits or attorney's fees were owed as a result of the claimant's compensable injury. The respondents contended that attorney's fees were not owed on controverted medical expenses that had been awarded. The respondents contended that any treatment the claimant received after March 11, 2006 was not reasonably necessary. The respondents contended that there were no further benefits owed to the claimant or to the claimant's attorney.

After a hearing, an administrative law judge filed an opinion on September 8, 2009. The administrative law judge

found, among other things, that the claimant's attorney was entitled to fees for legal services in the amount of \$9,713.54. The administrative law judge found that the claimant did not prove there should be a penalty for late payment of medical expenses, indemnity benefits or attorney's fees, and that the respondents were not in contempt of the Commission.

Both parties appeal to the Full Commission.

## II. ADJUDICATION

### A. Medical Treatment

The injured party bears the burden of proving that he is entitled to workers' compensation benefits. *Geo Specialty Chemical v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a) (Repl. 1996). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

An administrative law judge found in the present matter, "21. Claimant has not proven by a preponderance of

the evidence that liability remains for any outstanding medical expenses in connection with this claim." The Full Commission does not affirm this finding.

The parties stipulated that the claimant sustained a compensable injury on September 13, 1993. The claimant immediately began treating with Dr. Monfee for a lumbar strain. Dr. Saer performed a lumbar fusion in September 1995. An administrative law judge filed an opinion on October 29, 1996 and found that surgery provided by Dr. Saer was reasonably necessary. The administrative law judge directed the respondents to "pay all medical expenses associated with Dr. Saer's treatment within 30 days of receipt pursuant to Rule 30." The Full Commission and Court of Appeals affirmed the administrative law judge's opinion. A billing coordinator informed the respondents on October 18, 2001 that no further payment was owed for Dr. Saer's treatment. An administrative law judge found on March 11, 2002 that the claimant "failed to prove by a preponderance of the evidence that any benefits previously awarded remained unpaid."

Dr. Lucy stated on September 16, 2004 that the claimant's disability as of that date was not causally

related to the compensable injury. Dr. Lucy opined, however, that the claimant was a candidate for re-evaluation and consideration of additional treatment. Dr. Lucy specifically recommended additional diagnostic testing and an evaluation for depression related to pain. The record does not show that the claimant attempted to follow up with Dr. Lucy's treatment recommendations. Instead, the claimant resumed treatment with Dr. Monfee, the initial treating physician following the compensable injury, on January 10, 2005. A claims adjuster testified that the respondents did not controvert additional medical treatment until March 2006.

The claimant's attorney contends that treatment provided the claimant from 2005 to 2007 was reasonably necessary. The Full Commission finds that treatment provided the claimant by Dr. Monfee beginning January 10, 2005 was reasonably necessary in connection with the compensable injury. The evidence also demonstrates that, on at least three occasions after the respondents controverted the claim in March 2006, Edna Furr paid for treatment provided the claimant by Dr. Monfee. We direct Respondent No. 1 to reimburse Edna Furr in the amount of \$424.00 for

the checks Ms. Furr paid to Monfee Medical Clinic on December 21, 2006, July 30, 2007, and August 31, 2007. The Full Commission also finds that the treatment of record provided the claimant beginning January 10, 2005 until the claimant's death in December 2007, was reasonably necessary in connection with the compensable injury. This reasonably necessary treatment of record includes prescription medication and mileage. We recognize that the claimant's testimony that he received medical treatment for a lung condition not related to the compensable injury. Edna Furr testified, however, that she kept the billing records for the claimant's lung injury separate from treatment related to the workers' compensation injury.

B. Permanent Disability

"Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-9-519(e)(1) (Repl. 1996). In the present matter, an administrative law judge found that the claimant did not prove additional indemnity benefits should be awarded. The Full Commission affirms this finding.

The parties stipulated that the claimant sustained a compensable injury on September 13, 1993. The parties stipulated that Respondent No. 1 paid benefits at the "total disability rate" until March 18, 1999. Edna Furr testified that the respondents stopped paying benefits on March 19, 1999. An administrative law judge found on March 11, 2002 that the claimant proved he was permanently and totally disabled. Ms. Furr testified that the respondents resumed paying indemnity benefits on April 1, 2002. The Full Commission subsequently affirmed the administrative law judge's finding that the claimant proved he was permanently totally disabled.

Respondent No. 1 asserts that it paid its maximum liability, \$75,000. The record does not contradict Respondent No. 1's assertion that its limitation on compensation was met pursuant to Ark. Code Ann. §11-9-502(b) (Repl. 1996). The parties stipulated that Respondent No. 1 paid indemnity benefits at the total disability rate until the Death & Permanent Total Disability Trust Fund began paying permanent total disability benefits on September 26, 2005. The parties stipulated that the claimant died on December 4, 2007. Edna Furr testified that

the claimant continued to receive indemnity benefits until his death. The record does not demonstrate that either respondent owes additional indemnity benefits. Nor does the record show that the respondents are liable for a penalty in accordance with Ark. Code Ann. §11-9-802(Repl. 1996). The administrative law judge's decision is affirmed.

C. Fees for legal services

Ark. Code Ann. §11-9-715(a)(1)(A)(Repl. 1996) provides that fees for legal services rendered in respect of a claim shall not be valid unless approved by the Commission. An administrative law judge found in the present matter:

14. The liability of Respondents No. 1 for Claimant's attorney's fee amounts to \$7,778.38. Claimant's Exhibit 5 reflects, however, that they only paid counsel \$7,602.02. Hence, counsel is still owed the sum of \$176.36.

15. Claimant has proven by a preponderance of the evidence that Respondent No. 1 are still liable under Ark. Code Ann. §11-9-715 (Repl. 1996) for an attorney's fee of \$4,856.77 for the period of temporary total disability benefits that he was awarded that Respondents No. 1 controverted. Claimant is liable for the same amount, for a total of \$9,713.54 that is owed Claimant's counsel.

16. Claimant has not proven by a preponderance of the evidence that his attorney is entitled to an additional attorney's fee from Respondents No. 1 for the successful appeals to the Full Commission and to the Arkansas Court of Appeals. However, Claimant owes his counsel \$250.00 for these appeals....

The administrative law judge also found that the claimant did not prove a penalty should attach for late payment of attorney's fees. Although they filed a notice of appeal, Respondent No. 1's brief indicates that they have complied with the administrative law judge's findings. The respondents state that they have paid attorney's fees in the amount of \$176.36, \$9,713.54, and an additional payment of \$250.00, for a total of \$10,139.90. The claimant on appeal does not dispute the respondents' calculations and payments. The Full Commission affirms the administrative law judge's findings with regard to fees for legal services.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he was entitled to additional medical treatment beginning January 10, 2005 until the claimant's death on December 4, 2007. The claimant proved that the treatment of record for this period was reasonably necessary in connection with the compensable injury. We direct the respondents to reimburse Edna Furr in the amount of \$424.00 for the payments she made to Monfee Medical Clinic. The claimant did not prove he was entitled to any additional indemnity benefits. The claimant's attorney was entitled to fees for legal services,

and the respondents have complied with the administrative law judge's order in that regard. No penalty shall attach for late payment of attorney's fees. See Ark. Code Ann. §11-9-802(b) (Repl. 1996); *Turner v. Trade Winds Inn*, 267 Ark. 861, 592 S.W.2d 454 (1980). The respondents are not in contempt of the Commission pursuant to Ark. Code Ann. §11-9-706(Repl. 1996). We therefore reverse the administrative law judge's findings in part and reverse in part.

Separate and apart from the other fees for legal services awarded and paid in the present matter, the claimant's attorney is entitled to fees for legal services for the reasonably necessary medical treatment controverted by the respondents beginning in March 2006. See Ark. Code Ann. §11-9-715(a) (Repl. 1996). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of two hundred fifty dollars (\$250), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 1996). This \$250 fee is also separate and apart from other fees for legal services awarded and paid.

IT IS SO ORDERED.

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DAVID GREENBAUM, Special Commissioner

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PHILIP A. HOOD, Commissioner

Special Commissioner Wilson concurs in part and dissents in part.

Concurring and dissenting opinion

I respectfully concur in part and dissent in part. Specifically, I concur in the findings that the claimant's attorney was entitled to fees for legal services and the finding that a penalty should not attach for late payment of attorney's fees. However, I must respectfully dissent from the majority's finding that the claimant was entitled to additional medical treatment. In my opinion, the claimant has failed to meet his burden of proof.

The evidence demonstrates that Dr. Lucy was appointed by the Commission to perform an independent medical evaluation (IME) and assess the claimant's continuing need for medical treatment. Dr. Lucy concluded

that the claimant's continued symptomology was not the result of the claimant's work related injury.

Further, there is nothing in the record indicating that any medical bills were submitted for payment in conformity with Rule 30. The only evidence with regard to any outstanding medical bills is the testimony of the claimant's wife which lacked specificity. Simply put, there is not enough evidence in the record to demonstrate which medical expenses remain outstanding in connection with this claim. Therefore, I must respectfully dissent from the majority's award of benefits.

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MIKE WILSON, Special Commissioner